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In the Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, ET AL., PETITIONERS

v.

SCOTT NELSON AND VIVIAN NELSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit by a United States citizen against a foreign state alleging that the foreign state recruited him in this country for overseas employment and then imprisoned and tortured him on account of his employment-related activity in the foreign state.

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INTEREST OF THE UNITED STATES

The United States has a significant interest in the interpretation of the Foreign Sovereign Immunities Act, which protects the rights of both foreign nations and private litigants in United States courts by establishing uniform, objective standards for determining a foreign state's immunity from suit. See 28 U.S.C. 1602. This Court invited the views of the United States at the petition stage.

STATEMENT

Petitioners Kingdom of Saudi Arabia, King Faisal Specialist Hospital (a Saudi-owned health care facility), and Royspec (a Saudi-owned purchasing agency), challenge a court of appeals judgment hold-

ing that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, confers jurisdiction over a lawsuit filed by respondents Scott and Vivian Nelson. The Nelsons, who are American citizens, filed an action in the United States District Court for the Southern District of Florida seeking damages resulting from the Saudi government's arrest and alleged mistreatment of Scott Nelson in 1984, while he was employed by the King Faisal Specialist Hospital in Saudi Arabia. The district court dismissed the Nelsons' suit, rejecting their contention that the FSIA confers subject matter jurisdiction to adjudicate the dispute. Pet. App. 18a-25a. The court of appeals reversed, holding that the FSIA confers jurisdiction because the Nelsons' suit is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). Pet. App. 1a-17a.

1. The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Enacted in 1976, the FSIA provides the courts with objective criteria to determine whether suits against foreign states shall proceed. The FSIA replaces the prior ad hoc approach in which the courts deferred to what was sometimes perceived as the Executive Branch's desires based on foreign policy objectives. See *id.* at 486-488.

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity

under Sections 1605 through 1607 of the FSIA (28 U.S.C. 1605-1607). 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district court shall have personal jurisdiction over the foreign state as to those claims in which service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to the general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488.[1]

Section 1605(a) of the FSIA provides that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity bearing a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";

[1] Under the restrictive immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Verlinden*, 461 U.S. at 487.

(ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or

(iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2] Section 1605(a)(5) further provides that a foreign state shall not be immune from other actions where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989).[3]

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[2] The FSIA's definitions state:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

[3] Section 1605(a)(5) states that this provision shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

2. Saudi Arabia owns and controls the King Faisal Specialist Hospital, a health care facility located in Riyadh, Saudi Arabia. It also owns and controls Royspec, the hospital's purchasing agent, which buys American medical supplies through an office located in this country. Beginning in 1973, Saudi Arabia contracted with an independent non-Saudi company, the Hospital Corporation of America (HCA), to recruit Americans for employment at the King Faisal Specialist Hospital. In 1983, while in the United States, Scott Nelson saw and answered an HCA advertisement for a position with that hospital. He attended a job interview in Saudi Arabia, returned to the United States, and signed an employment contract in Miami, Florida to work as a Monitoring Systems Engineer. Nelson attended a brief HCA orientation program in the United States. In December 1983, he began working at the King Faisal Specialist Hospital in Riyadh. Pet. App. 3a, 11a, 18a-19a.

The Nelsons' complaint arises from events that occurred during his employment in Saudi Arabia. The complaint alleges that on or about March 20, 1984, while performing his job duties in monitoring facilities at the King Faisal Specialist Hospital, Scott Nelson discovered certain unspecified safety hazards and reported those hazards to hospital officials and a Saudi government commission. Compl. ¶¶ 9, 10. The complaint further alleges that on or about September 27, 1984, "[a]s a direct and proximate result of these actions," Scott Nelson was summoned to the

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(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 1605(a)(5)(A) and (B).

hospital security office, arrested by Saudi government agents, and imprisoned for 39 days, during which period he was interrogated, beaten, tortured, and held incommunicado. Compl. ¶¶ 11, 12, 13. The complaint also alleges that a Saudi agent informed Nelson's wife that her husband could be released if she provided sexual favors. Compl. ¶ 13. See Pet. App. 4a, 19a.[4]

The Nelsons' complaint asserts 16 causes of action against petitioners. The causes of action fall into three basic categories. First, in Counts 1, 9, and 13 of the complaint, the Nelsons allege that the petitioners negligently failed to warn Scott Nelson that Saudi officials "have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause," Compl. ¶¶ 15, 48, 68, and that "employees and/or officials of the [King Faisal Specialist Hospital] would be likely to take severe retaliatory action against Nelson if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered in [the hospital]." Compl. ¶¶ 16, 49, 69. Second, in Counts 2 through 7 and Counts 10, 11, 14, and 15, the Nelsons allege that petitioners committed various intentional wrongs against Scott Nelson. Third, in Counts 8, 12, and 16, the Nelsons assert spousal "derivative" claims alleging that Vivian Nelson sustained damages as a result of the foregoing alleged wrongs.[5]

[4] Petitioners dispute most of those allegations. They admit that Nelson was arrested, but they allege that he was detained on charges that he falsified his employment credentials by submitting a forged diploma. Pet. 4; Pet. App. 16a, 19a n.1. In the brief the Nelsons filed in response to the United States' amicus brief at the petition stage, the Nelsons contend that they have "flatly denied the existence of any facts suggesting the 'exercise of police power.'" Resp. Reply Br. to U.S. Amicus Br. 9 n.12. Their complaint, however, alleges that Scott Nelson was "arrested," Compl. ¶¶ 15, 48, 68, alleges acts by Saudi Arabian agents or employees "in their official capacity," Compl. ¶ 18, and defines the tort of "torture" as one committed by public or law enforcement officials. Compl. ¶¶ 23, 26.

3. Petitioners successfully moved the district court to dismiss the Nelsons' complaint for lack of subject matter jurisdiction under the FSIA. Pet. App. 18a-25a. The district court noted that "[t]he parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1." Pet. App. 20a. That provision, the court stated, required the court to resolve two questions: "first, did any of the [petitioners] carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities." *Id.* at 21a.

The district court found that the "only commercial activities allegedly undertaken in this country by Saudi Arabia and [King Faisal Specialist Hospital] * * * relate to Nelson's recruitment" and that a separate corporation—HCA—actually conducted those activities. Pet. App. 21a. The court concluded that even if the Saudi government's involvement with HCA amounted to an agency relationship, "the link between the recruitment activities and the [petitioners] is not sufficient to establish 'substantial contact' with

[5] The complaint asserts eight of the 16 claims specifically against Saudi Arabia: negligence (Count 1); battery (Count 2); unlawful detainment (Count 3); wrongful arrest and imprisonment (Count 4); inhuman torture (Count 5); disruption of normal family life (Count 6); mental anguish (Count 7); and a spousal derivative claim (Count 8). The complaint asserts four essentially identical claims against the Hospital and Royspec: negligence (Counts 9 and 13); battery (Counts 10 and 14); false imprisonment (Counts 11 and 15) and a spousal derivative claim (Counts 12 and 16).

the United States." *Id.* at 21a-22a (quoting 28 U.S.C. 1603(e)). The court observed that the FSIA's legislative history gave various examples of "substantial contact," but none of those examples resembled the situation here. Pet. App. 22a-23a.[6]

In contrast, the district court concluded Royspec had engaged in commercial activity in the United States by acting as King Faisal Specialist Hospital's purchasing agent. Pet. App. 23a. The court concluded, however, that the Nelsons' complaint was not "based upon" Royspec's commercial activity. *Ibid.* See 28 U.S.C. 1605(a)(2). The court explained that "[t]he only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." Pet. App. 23a. The court found "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint," *id.* at 23a-24a, and additionally stated that "even if the court had determined that [King Faisal Specialist Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint," *id.* at 24a.

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[6] The Nelsons also sued HCA in a separate action. See Pet. App. 19a n.2. That suit was dismissed under the statute of limitations and for contributory negligence stemming from Scott Nelson's submission of the falsified diploma to obtain Saudi employment. *Nelson* v. *Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990). The Eleventh Circuit affirmed that decision without opinion. *Nelson* v. *Hospital Corp. of America*, 946 F.2d 1546 (1991) (Table).

4. The court of appeals reversed. Pet. App. 1a-17a. It concluded "that, on the facts presented, the recruitment and hiring of Nelson in the United States was a 'commercial activity' of the Saudi government, and that Nelson's subsequent detention and torture were 'based upon' Nelson's recruitment and hiring in the United States." *Id.* at 17a. The court of appeals reasoned that Saudi Arabia engaged in a commercial activity having substantial contact with the United States by contracting with HCA to act as Saudi Arabia's agent in recruiting Americans to work at the King Faisal Specialist Hospital. *Id.* at 11a-12a. The court further reasoned that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 15a.

Although the court of appeals did not squarely address the question, it apparently concluded that the King Faisal Specialist Hospital is also subject to suit. The court specifically held that Royspec was subject to suit, because Royspec maintains an office in Maryland and acts as purchasing agent for the Hospital, because Nelson was given Royspec's telephone number so that his family could contact him, and because Nelson received telegrams concerning his employment bearing the telex designation "ROSPEC." Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

The Nelsons allege that Saudi Arabia subjected them to treatment within that nation's borders that violates American standards of fairness and decency. The Nelsons' allegations of inhumane treatment, however, should not obscure the legal issue in

this case. The question is whether the FSIA confers jurisdiction over their suit. The court of appeals erred in concluding that the district court could exercise jurisdiction under the first clause of the FSIA's commercial activity exception, which allows adjudication of a suit against a foreign state that "is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

The first clause of the FSIA's commercial activity exception expressly requires that a plaintiff's action be "based upon"—and not merely related to—commercial activity carried on in the United States. In other words, the commercial activity must be the basis for the cause of action and not, for example, simply a link in the chain of events that led to an overseas injury. The question is not, as the court of appeals mistakenly believed, whether there is a "nexus" between the commercial activity and the plaintiff's injury. The question instead is whether the commercial activity provides the gist or gravamen of the complaint.

In this case, the Nelsons' complaint identifies the relevant commercial activity as Saudi Arabia's recruitment of Scott Nelson in the United States for overseas employment. Although Saudi Arabia's alleged recruitment is a commercial activity carried on in this country, it does not provide the basis for the Nelsons' intentional injury claims. The Nelsons do not contend that Saudi Arabia's recruiting activity was itself intentionally wrongful. Instead, they allege that it was a link in the causal chain that led to Scott Nelson's mistreatment in Saudi Arabia. Those allegations do not satisfy the "based upon" requirement.

The Nelsons also assert negligence claims that might be construed to allege that when Saudi Arabia

recruits persons in the United States for overseas employment, the foreign state must warn the prospective employees that Saudi law enforcement practices differ from American law enforcement practices. Although Saudi Arabia's alleged recruitment activity may provide the basis for such a claim, it is not clear that the claim would state a valid cause of action. That matter, however, is best addressed on remand after this Court clarifies that any negligence claim must be "based upon" and not simply causally related to the Saudi recruiting activity.

ARGUMENT

THE COURT OF APPEALS INCORRECTLY INTERPRETED THE FOREIGN SOVEREIGN IMMUNITIES ACT'S COMMERCIAL ACTIVITY EXCEPTION

Petitioners challenge the court of appeals' conclusion that the Nelsons' civil action for damages falls within the FSIA's commercial activity exception. The court reasoned that the Nelsons satisfied the first cause of the exception, because they alleged a factual relationship between Saudi Arabia's employee recruitment activity in this country and Scott Nelson's detention and alleged mistreatment in Saudi Arabia:

> In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia.

Pet. App. 15a. The precise content of the court's test, which it describes as a "nexus" requirement, *id.* at 12a, 13a, 16a, is unclear. The court of appeals' decision appears to require no more than that the commercial activity be a link in the chain of events

that leads to a plaintiff's injury, and it may require even less.[7]

Whatever its scope, the court of appeals' essentially ad hoc test rests on a misinterpretation of the FSIA. To fall within the first clause of the FSIA's commercial activity exception, a plaintiff must identify a commercial activity carried on by the foreign state in this country that is the basis for a valid cause of action. The Nelsons have failed to make such a showing in this case.

A. A Foreign State Is Subject To Suit In A United States Court If The Foreign State's Commercial Activity In This Country Is The Basis For A Cause of Action

The FSIA provides that "a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of several statutorily defined exceptions applies." *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992) (emphasis omitted), quoting 28 U.S.C. 1604.

[7] The court of appeals seems to have reasoned that Scott Nelson was recruited in the United States for the job of "detecting and reporting safety violations," he was arrested "as a result of those actions," and his arrest and mistreatment therefore "resulted from and were directly attributable to [his] employment." Pet. App. 16a. The court of appeals also stated that Saudi Arabia's argument that Saudi officials arrested Nelson based on his submission of a forged diploma "in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." *Ibid.* The court of appeals additionally concluded, however, that Royspec was subject to suit merely on the basis that Nelson was given Royspec's telephone number and he received four telegrams regarding his employment that bore a telex designation—"ROSPEC"—that is similar to Royspec's business name. *Id.* at 17a.

The Nelsons predicate their suit against petitioners on the first clause of the FSIA's commercial activity exception, which provides that a foreign state shall be subject to the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

To fall within that clause, the Nelsons must first establish that petitioners have "carried on" a "commercial activity" in the United States. The FSIA defines the term "commercial activity" to include "a regular course of commercial conduct or a particular commercial transaction or act," and it directs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). See *Weltover*, 112 S. Ct. at 2165-2168. More particularly, the FSIA defines the phrase "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

The Nelsons' allegations, taken as true, indicate that Saudi Arabia carried on only one pertinent commercial activity in the United States. According to the allegations below, Saudi Arabia entered into a contract with HCA (a non-Saudi corporation) to recruit individuals in this country for overseas employment at the Saudi-owned King Faisal Specialist Hospital. If Saudi Arabia utilized HCA as its agent, then Saudi Arabia effectively "carried on" that recruting activity in this country. See 1 Restatement (Second) of Agency § 1 (1958) (defining an agency

relationship).[8] Furthermore, the recruitment of hospital employees is a "commercial activity" within the meaning of the FSIA. HCA engaged in a recruitment activity no different than it might engage in for a private hospital, extending contractual offers of employment to perform health-care-related services. In light of those allegations, the court of appeals could conclude for purposes of petitioners' motion to dismiss that Saudi Arabia carried on a commercial activity in the United States.[9]

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[8] Under familiar principles of agency law, a principal may be liable for the actions of an agent empowered to act on the principal's behalf and under its control. See, *e.g.*, 1 Restatement (Second) of Agency § 144 (1958). Thus, if the foreign state employs an agent to conduct an activity in the United States on the foreign state's behalf, then the foreign state may be held to have "carried on" the activity itself. The court of appeals stated that the contract between Saudi Arabia and HCA "created an agency relationship." Pet. App. 11a. The district court, however, had not resolved that question, which it speculated "may be a pivotal factual issue in the related case" against HCA. *Id.* at 21a-22a.

[9] It is not so clear that the King Faisal Specialist Hospital has carried on a commercial activity in this country. As the court of appeals recognized, the Kingdom of Saudi Arabia—and not King Faisal Specialist Hospital—contracted with HCA to recruit employees for the hospital. Pet. App. 3a, 11a. See Notice of Filing in Support of Plaintiffs' Memorandum in Opposition to Defendant Royspec's Motion to Dismiss Complaint (S.D. Fla. June 29, 1989), Exh. 2 (agreement between the Royal Cabinet of the Kingdom of Saudi Arabia and HCA). The Nelsons contend that the hospital was also a party to the contract, see Resp. Reply Br. to U.S. Amicus Br. 7, but the contract was signed by a Saudi official on behalf of Saudi Arabia and simply identified the hospital as a recipient of HCA's services. Although Royspec apparently carries on commercial activity in the United States as purchasing agent for the hospital, that activity appears to have no relationship to the Nelsons' complaint. See p. 24 n.16, *infra*.

The mere fact that a foreign state has conducted commercial activity in this country, however, is not sufficient to satisfy the first clause of the FSIA's commercial activity exception. In addition, the suit against the foreign state must be "based upon" that activity. 28 U.S.C. 1605(a)(2). Applied according to its defined meaning, the term "based upon" requires that the foreign state's commercial activity be the "basis" for—and not merely related to—the cause of action. See *Webster's Third New International Dictionary* 180-181 (1986) (defining the verb "base"); accord *Random House Dictionary* 172 (1987). The specific language requires that the commercial activity provide the foundation for the plaintiff's action. See *Black's Law Dictionary* 128 (5th ed. 1979). The commercial activity must supply the "gist" or "gravamen" of the plaintiff's complaint. See *id.* at 620, 631; accord *Webster's Third New International Dictionary* 959, 992 (1986); *Random House Dictionary* 808, 833 (1987).[10]

The court of appeals therefore erred in concluding that the FSIA's "based upon" requirement is

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[10] See *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). Some courts hold that the commercial activity must be an "element" of the claim. See *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 & n.3 (7th Cir. 1991) (claim is "based upon" events in the United States if those events establish a legal element of the claim, "almost always" the element of duty); *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). That formulation, however, is not entirely consistent with the statutory language. To satisfy the literal meaning of the "based upon" requirement, the commercial activity must provide the "basis"—the "foundation" or "fundamental ingredient"—of the cause of action. See *Webster's Third New International Dictionary* 182 (1986); accord *Random House Dictionary* 174 (1987).

satisfied if a causal "nexus" exists between the foreign state's commercial activity and the plaintiff's injury. A commercial activity is not the basis of a cause of action if the activity merely has a "connection" or "link" to *other* actions that provide the foundation or gist of the plaintiff's complaint. See *Webster's Third New International Dictionary* 1524 (1986) (defining "nexus"). If Congress had intended the conceptually different and far less significant relationship that the term "nexus" denotes, it would not have required that the action be "based upon" the commercial activity. Rather, it would have stated that the action must be "related to" or "in connection with" the commercial activity.[11]

Significantly, Congress routinely employs phrases such as "related to" or "in connection with," when that is what it means to say. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (holding that "a state law 'relates to' an

[11] Those courts that have equated the term "based upon" with a "nexus" requirement have confessed disdain for a "literal reading of the first clause." See, *e.g.*, *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 200, 202 (5th Cir. 1984). They have adopted the "nexus" test based on a policy judgment rather than any discernible principle of statutory construction. See *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 582 n.10 (7th Cir.) (collecting cases), cert. denied, 493 U.S. 937 (1989); *Vencedora Oceanica*, 730 F.2d at 200-201 (same). The courts, however, are obligated to heed the literal meaning of the statute, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). This is not that sort of rare case.

employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan' "). Indeed, the second and third clauses of the commercial activity exception employ such terms. They state that a foreign state is not immune from suit in any case in which the action is based

> upon an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2) (emphasis added). See *Weltover*, 112 S. Ct. at 2164-2165. Congress understood the difference between a "based upon" and an "in connection with" requirement, and it drafted the commercial activity exception with apparent attention to the difference. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (construing "interest" as employed in RICO statute, 18 U.S.C. 1963(a)(1), in light of express restriction in neighboring provision).[12]

The plain import of the statutory language is sufficient by itself to reject the court of appeals' "nexus" test. See, *e.g.*, *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 575 & n.14 (1991); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). To the extent it is relevant, the FSIA's legislative history further

[12] Although the court of appeals improperly used the term "nexus" to describe the "based upon" requirement, the term is sometimes used to describe the FSIA's additional requirement of a relationship between a foreign state's commercial activity and the United States. Cf. G. Born & D. Westin, *International Civil Litigation in United States Courts* 369 (1989).

undermines that court's ruling. The Senate and the House Committees on the Judiciary prepared virtually identical reports on the FSIA. See S. Rep. No. 1310, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). The House Report states:

> Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

H.R. Rep. No. 1487, *supra*, at 18-19. The examples given in the referenced analysis—"cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States" (H.R. Rep. No. 1487, *supra*, at 17)—all fall within the plain meaning of the term "based upon." In each example, the Report envisioned that the commercial activity—typically a contractual undertaking—would provide the gist of the complaint.[13]

[13] The Nelsons mistakenly suggest that our interpretation of the "based upon" requirement would deny jurisdiction in the case of a contract action "where all the negotiations on a loan agreement or other commercial contract took place in the United States, provided only that the contractual obligation ripened and the breach occurred elsewhere." Resp. Reply Br. to U.S. Amicus Br. 6. The Nelsons' objection is answered by the FSIA's broad definition of the term "commercial activity carried on in the United States," which includes activity "having substantial contact with the United States." 28 U.S.C. 1603(e). Under that definition, a contract that is negotiated in the United States with a private party may qualify as a "commercial activity carried on in the United States." A party could bring a lawsuit for breach of contract if the action is "based upon" the commercial activity—specifically, upon a contract having "a substantial contact" with this country.

The Report's discussion of the second clause of the commercial activity exception, which deprives a foreign state of immunity in cases "in which the action is based * * * upon an act performed in the United States in connection with commercial activity of the foreign state elsewhere," 28 U.S.C. 1605(a)(2), also is instructive. The Report notes that the first and second clauses overlap, but "it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad." H.R. Rep. No. 1487, *supra*, at 19. The Report was careful to note, however that

> the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

Ibid. The Report was referring to the limitation imposed by the "based upon" requirement, which appears in and limits equally all three clauses of the commercial activity exception.[14]

[14] The Nelsons attempt to explain away that passage by arguing, contrary to the usual axioms of statutory construction, that the term "based upon" should have a different meaning in the second clause. They contend that because the second clause does not require that the foreign state's com-

The court of appeals' "nexus" approach is also inconsistent with the rationale underlying the commercial activity exception. As this Court recently recognized, the commercial activity exception is an outgrowth of the "restrictive" theory of sovereign immunity, which draws a "distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other." *Weltover*, 112 S. Ct. at 2166. That theory posits that a foreign state is subject to suit based upon its commercial activities, because "[a] foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns'; rather, it 'exercise[s] only those powers that can also be exercised by private citizens.'" *Ibid.*, citing *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion). The FSIA preserves that distinction by allowing suits "based upon" commercial activity. The court of appeals' "nexus" approach, however, would effectively eliminate the distinction by allowing, under the commercial activity exception's first clause, suits challenging a foreign state's noncommercial acts. Under the court's rationale, a foreign state may be sued on any act, whatever its character and wherever its location, so long as the plaintiff alleges that the act has some connection or link to commercial activity in this country. The Nelsons' complaint, which invokes the commercial activity exception to sue a foreign state with respect to its arrest of an individual within the foreign state, illustrates the far-reaching consequences of that approach.

B. The Nelsons' Intentional Injury Claims Should Be Dismissed

The FSIA's commercial activity exception finds its most frequent use in contractual disputes between foreign states and private parties. Application of the "based upon" requirement presents no difficulties in that context. If a foreign state enters into a lawful contract that has a "substantial contact" with the United States, the foreign state may be subject to suit in an American court to enforce the contractual obligation. The foreign state's commercial undertaking gives rise to a legally enforceable obligation and provides the basis for a breach of contract action if the foreign state fails to perform as promised. The Nelsons, however, do not allege a breach of Scott Nelson's employment contract; instead, they allege that petitioners have committed various intentional wrongs.[15]

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mercial activity be carried on in the United States, Congress intended a "further restriction on access to American courts" in that context alone. Resp. Reply Br. to U.S. Amicus Br. 5. That hypothesis finds no support in either the language of the statute or the legislative history. The Nelsons also err in relying on a hearing witness's general statement about the FSIA, which they characterize as "the only statement in the legislative history of the FSIA that explains the meaning of the 'based upon' requirement." *Id.* at 6 n.7. Mr. Ristau simply observed that "[i]f a dispute arises as a result of an activity which a government carries on in this country, the most appropriate place to resolve such a dispute would be through the courts, which are, after all, designed to do just that: to resolve the dispute which has arisen here." *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973). That general observation does not "explain[] the meaning of the 'based upon' requirement." Resp. Reply Br. to U.S. Amicus Br. 6 n.7.

[15] Significantly, the employment contract (which is between King Faisal Specialist Hospital and Scott Nelson and provides for performance in Saudi Arabia) states that in the

The FSIA does not prohibit a plaintiff from invoking the commercial activity exception to obtain juristion over a foreign state in a tort action. Section 1605(a)(5) of the FSIA (which this Court has described as the exception for "noncommercial torts," *Argentine Republic*, 488 U.S. at 439) indicates by implication that the commercial activity exception may embrace tort suits. It provides an exception from immunity in specific tort actions "not otherwise encompassed in paragraph (2) above"—*viz.*, the commercial activity exception. See 28 U.S.C. 1605(a)(5). Thus, the FSIA contemplates that when a foreign state conducts a commercial activity, it is generally subject to the same types of tort suits that a private business would encounter. See also H.R. Rep. No. 1487, *supra*, at 17 (noting that the commercial activity exception encompasses actions based on "business torts occurring in the United States"). The requirements of the first clause of the FSIA's commercial activity exception remain the same. As in contract actions, the foreign state's commercial activity in this country must provide the basis for the cause of action.

The commercial activity involved here—Saudi Arabia's recruitment of Scott Nelson to work at its overseas hospital—does not provide a basis for the intentional injury and related spousal derivative claims that the Nelsons assert in their complaint. The Saudi recruiting activity provides the basis for

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case of any dispute arising from this contract, the Saudi courts, authorities, or commissions only will have jurisdiction. See Pet. App. 24a n.4. Such forum selection agreements are presumptively lawful. See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The employment contract is attached as an exhibit accompanying an affidavit filed with Royspec's motion to dismiss the complaint for lack of jurisdiction. See Declaration of Ali S. Al-Shabrami (Mar. 1, 1989).

such claims only if the recruiting activity itself provides the gist of the Nelsons' cause of action. The Nelsons, however, do not allege that Saudi authorities intentionally injured Scott Nelson during the recruitment process or that they recruited him in this country with the intent to injure or imprison him. Instead, they base their intentional tort claims on wrongs allegedly committed against Scott Nelson during his employment in Saudi Arabia. For example, the battery count of the complaint states:

> 18. Defendant, SAUDI ARABIA, by and through its agents or employees, acting in their official capacity, did intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, strike and assault the body of [Scott Nelson], without his consent, and thereby cause great bodily harm, permanent disability, and permanent disfigurement.

Compl. ¶ 18. The gist of that claim is an intentional wrongful act in the foreign state—and not Saudi Arabia's recruitment activity in this country. The action is not "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

The Nelsons cannot cure that deficiency by arguing that the recruiting activity and what allegedly occurred in Saudi Arabia are causally "intertwined," Pet. App. 15a, or that "but for his recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries." *Id.* at 24a. The Nelsons' intentional tort claims must be "based upon," and not merely related to, commercial activity in this country. And because the recruitment activity does not provide a basis for the intentional

tort claims, it cannot support Vivian Nelson's related spousal derivative claims.[16]

C. The Nelsons' Failure To Warn Claim Against Saudi Arabia Should Be Remanded For Evaluation Under the Proper Standard

The same analysis applies to the Nelsons' negligence claims. Those claims are predicated upon petitioners' failure to warn Scott Nelson "of the hidden dangers associated with the employment." Compl. ¶¶ 14, 47, 67. Although the claim against Saudi Arabia may be based in part upon Saudi Arabia's alleged recruiting practices in this country, it is not clear that the claim states a valid cause of action.

When a foreign state conducts a commercial activity in this country, it must comply with federal and state laws governing the activity. Thus, if Saudi Arabia conducts recruitment activity in this country, it is subject to federal and state laws governing the

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[16] The Nelsons premise most of their intentional wrong claims against Saudi Arabia on United Nations declarations and covenants. See Compl. ¶¶ 19-33. The Nelsons fail to explain how those declarations and covenants give rise to a judicially enforceable cause of action. But there is no need to reach that issue, because those claims, like the battery count, fail in any event to satisfy the FSIA's "based upon" requirement. With respect to King Faisal Specialist Hospital, it appears that the hospital did not carry on any commercial activity in the United States. See note, 9, *supra*. There is accordingly no basis for suit against that entity. In the case of Royspec, its only involvement with Nelson was the provision of a telephone number that his family could use to reach him in the case of an emergency. That action plainly does not provide a basis for the causes of action alleged here. Cf. *Zedan*, 849 F.2d at 1513 (no jurisdiction provided under FSIA's commercial activity exception for action based on recruiting telephone call, as opposed to employment contract).

hiring of employees, including standards of conduct enforced through the common law of tort. If Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence. See generally 2 Restatement (Second) of Torts §§ 281, 282, 298 (1965).

The Nelsons' negligence count against Saudi Arabia alleges that Saudi Arabia breached a duty of care in the following manner:

> 15. At the time it recruited and employed [Scott Nelson], as well as during the time [Scott Nelson] was reporting safety violations, SAUDI ARABIA knew or should have known that officials of the Saudi government, and officials of Saudi institutions such as [King Faisal Specialist Hospital], have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused without legal cause.
>
> 16. SAUDI ARABIA knew, or should have known, at the time it recruited and employed [Scott Nelson] that the employees and/or officials of the [King Faisal Specialist Hospital] would be likely to take severe retaliatory action against NELSON if he reported and/or attempted to remedy and/or disclose to others any health-related or other hazards or problems he discovered in [the hospital].
>
> 17. Despite SAUDI ARABIA's knowledge of the above factors, defendant did breach its duty of care to [Scott Nelson] in that it took no action to warn NELSON of the dangers of his job at [King Faisal Specialist Hospital], at the time it recruited him, at the time he began his employment, or at the time he was engaged in reporting the safety hazards at the hospital.

Compl. ¶¶ 15-17. That count seems to allege that Saudi Arabia was negligent in failing to warn Scott

Nelson that he would be intentionally abused for performing his job. If the Nelsons' legal theory is that an assailant has a duty to warn his victim before the assailant commits a battery, then their negligence claim should be dismissed as merely a formalistic recasting of their intentional tort claims into a failure to warn claim. Cf. *United States* v. *Shearer*, 473 U.S. 52, 59 (1985).

The Nelsons' allegations might be construed, however, to state a claim based on the theory that overseas employment recruiters generally are under an affirmative duty to warn prospective employees about overseas law enforcement practices. If the Nelsons assert that Saudi Arabia breached some such alleged duty of care when it recruited Scott Nelson, the Nelson's action could be "based upon" Saudi Arabia's recruiting activity. In that situation, Saudi Arabia's alleged recruiting activity would provide the basis for the claim. The question would remain, however, whether the law imposes a duty on overseas employment recruiters to warn about foreign law enforcement practices such that the Nelsons' claim would identify a valid cause of action under which the Nelsons would be entitled to relief.

The question whether the Nelsons' allegations state a valid negligence cause of action is best addressed on remand, after this Court clarifies that any negligence claim must be "based upon," and not simply causally related to, the Saudi recruiting activity. A determination whether the Nelsons' allegations state a negligence cause of action would require clarification of their claim, including what substantive law entitles them to relief. It is unclear from the complaint whether the Nelsons rely on the law of Florida or some other jurisdiction. Furthermore, it is unclear

whether the Nelsons would agree with our suggestion that their negligence claim is based on the theory that an overseas recruiter is under an affirmative duty to warn prospective employees about the law enforcement practices of the foreign state where the employee will work. A remand would allow the Nelsons to clarify those matters. The district court could then resolve whether the Nelsons have stated a valid cause of action that the FSIA would allow to go forward.

CONCLUSION

The decision of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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